BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROLANDA JOHNSON (Deceased) Claimant	)	
VS.	)	
SUGARLOAF OF GREAT PLAINS Respondent	)	Docket No. 1,040,704
AND	)	
ZURICH AMERICAN INSURANCE CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the April 16, 2012, Award entered by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on August 7, 2012. Jan L. Fisher, of Topeka, Kansas, appeared for claimant. P. Kelly Donley, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant had a 21 percent permanent partial impairment to the right upper extremity at the level of the shoulder and a 15 percent permanent partial impairment to the left upper extremity at the level of the shoulder. The ALJ found that claimant failed to prove she suffered any permanent impairment to her neck or cervical spine as a result of her work-related injury and therefore was not entitled to a whole body functional impairment or a work disability.

The Board has considered the record and adopted the stipulations listed in the Award. In addition, during oral argument to the Board, the parties agreed to the permanent impairment ratings awarded to claimant by the ALJ for her upper extremity injuries of 21 percent for the right upper extremity and 15 percent for the left upper extremity. The parties further agreed that if claimant has a permanent impairment of function to her cervicothoracic spine, it is 5 percent to the body as a whole. Likewise, if claimant is determined to have a general body disability, then her work disability is 82.5 percent based upon a 100 percent wage loss and a 65 percent task loss, which is the average of the task

loss opinions given by Drs. Brown and Pratt. Permanent partial disability based upon work disability would commence on October 23, 2007, when temporary total disability compensation ended, and would continue through May 18, 2011. Claimant died on May 18, 2011, for reasons unrelated to the injuries suffered in the March 25, 2005, accident and, therefore, workers compensation benefits will cease on that date.

ISSUES

Claimant argues that she proved she suffered permanent impairment to her cervical spine and is entitled to an award based upon a whole body disability rather than two scheduled injuries only.

Respondent asks that the Board affirm the ALJ's Award in full.

The issue for the Board's review is whether claimant suffered an injury to her cervical spine as a direct consequence of her work-related accident of March 25, 2005.

FINDINGS OF FACT

The claimant in this case, Rolanda Johnson, died on May 18, 2011. There has been no claim that her death was related to her work-related injuries.

Claimant worked for respondent servicing arcade machines. On March 25, 2005, claimant was pulling on a sit-down driving machine in preparation to working on it when a large child jumped into the machine. As claimant continued to pull, the machine came to an abrupt stop. Claimant sustained an injury to her right shoulder. Claimant was found to have a right rotator cuff tear, and on February 16, 2006, Dr. Garcia performed an arthroscopic subacromial decompression of the right shoulder. Claimant returned to work after the surgery on May 8, 2006. She testified that about two weeks after returning to work, she started having symptoms in her left shoulder and neck, as well as continuing to have problems in her right shoulder area.

Claimant had a second surgical procedure on her right shoulder on April 26, 2007, also performed by Dr. Garcia. Claimant testified that her last day of work at respondent was on April 25, 2007, the day before her surgery. She did not work anywhere after that date. According to the Stipulation filed by the parties on March 19, 2012, she received temporary total disability benefits from April 30, 2007, through October 22, 2007.

Because claimant was continuing to have complaints, she was referred to Dr. William O. Reed. Although claimant testified that Dr. Reed performed a third surgical procedure on her right shoulder, the medical reports in the record indicate that instead,

claimant received a set of three injections in her right shoulder.[1] Claimant also apparently complained of neck/cervical spine pain and Dr. Reed ordered an MRI in December 2007, which was normal. Claimant last saw Dr. Reed on May 5, 2008.

At the request of claimant's attorney, claimant was examined by Dr. C. Reiff Brown on November 4, 2008. In examining claimant's right shoulder, he found she had some crepitus and acromial impingement. She had severe pain and severe loss of range of motion and weakness of her abductor function. He diagnosed her with residual rotator cuff tendonitis and acromial impingement syndrome involving the right shoulder and recommended she be seen by an orthopedist specializing in shoulder surgery.

Claimant also complained of activity-related discomfort in her left shoulder that had developed in the course of the treatment of her right shoulder condition. Claimant attributed her left shoulder problems to overuse while performing functions she normally would have performed with her right hand. Dr. Brown examined claimant's left shoulder and found she had tenderness over the rotator cuff and mild loss of range of motion due to rotator cuff tendonitis. Dr. Brown testified that claimant had some degree of acromial impingement, although his November 4, 2008, report stated: "The acromial impingement sign is negative."[2]

Although Dr. Brown's report of November 4, 2008, does not indicate that claimant made any complaints to him concerning her cervical spine/neck, Dr. Brown stated that "while Doctor Reed was treating her she complained of neck problems, and on that basis [Dr. Reed] obtained an MRI scan of the neck."[3] Dr. Brown examined claimant's upper back and neck area and found that claimant had normal range of motion of the cervical spine but had tenderness in the lower cervical paraspinal muscles. He noted that the tenderness also extended down into the scapular and interscapular muscles, especially on the right. Dr. Brown stated that claimant had trigger points in those area, and he believed the trigger points were distributed such that a diagnosis of myofascial pain syndrome could be made.

Dr. Brown recommended claimant have restrictions to permanently avoid the use of her right hand above chest level. Dr. Brown further recommended that claimant's lifting with the right hand between waist and chest level should be limited to 15 pounds occasionally and 5 pounds frequently. She should avoid reaching away from the body more than 14 inches with the right hand, frequent use of the left hand above shoulder level, and frequent reaching away from the body more than 18 inches. Claimant should do no lifting above chest level with the left hand.

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[1] Dr. Reed's records were not made a part of the record. The information about claimant's injections was retrieved from the independent medical reports of Dr. C. Reiff Brown and Dr. Terrence Pratt.

[2] Brown Depo., Ex. 2 at 4.

[3] Brown Depo. at 15.

In response to a letter from claimant's attorney of August 21, 2009, Dr. Brown reviewed his medical report and file as well as the independent medical examination (IME) report of Dr. Terrence Pratt. On August 31, 2009, Dr. Brown responded to the letter from claimant's attorney and opined that claimant was at maximum medical improvement (MMI). Based on the AMA *Guides*,[4] Dr. Brown rated claimant as having a 26 percent impairment to her right upper extremity at the level of the shoulder and a 2 percent permanent partial impairment to the left upper extremity at the level of the shoulder. Dr. Brown was later advised by claimant's attorney of Dr. Do's treatment of claimant's left shoulder and reviewed Dr. Do's medical records and operative notes. Dr. Brown indicated that shoulder impairments are based on range of motion but that no range of motion measurements were done after claimant's left shoulder surgery. However, based on his experience, he concluded if claimant recovered half of her range of motion, she would have a 25 percent permanent impairment of her left upper extremity.

On August 31, 2009, Dr. Brown also placed claimant in DRE Cervicothoracic Category II for a 5 percent permanent partial impairment to the whole body based on her myofascial pain syndrome. He acknowledged that MRI scans of claimant's cervical spine done in 2007 and 2010 were normal and showed no pathology that would explain claimant's neck symptoms. He also acknowledged that there was no mention in claimant's medical records of neck symptoms until Dr. Reed's records noted the complaints in late 2007. Nevertheless, he believed claimant had an original injury to the neck in the 2005 accident and that the injury was a cervical strain. When he rated claimant's impairment, he did not rate a cervical strain but only provided a rating for myofascial pain syndrome. Dr. Brown was not certain whether claimant's myofascial pain syndrome was a result of the right shoulder injury or a neck injury. But after claimant's attorney read to him some of claimant's testimony about the myofascial pain syndrome developing after returning to work following her first surgery, Dr. Brown opined that her myofascial pain syndrome developed after the original injury and was an indirect result of the rotator cuff tendonitis and subsequent treatment for that. Dr. Brown reviewed Dr. Pratt's report of May 2009 and Dr. Do's reports in August 2010, and in both reports claimant was still complaining of symptoms to the cervicothoracic area. Dr. Brown believed that claimant's cervical problems were permanent in nature.

Dr. Brown reviewed the task list prepared by Doug Lindahl.[5] Of the 26 tasks on the list, he believed that claimant would have been incapable of performing 18 for a 69 percent task loss.

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[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[5] Doug Lindahl, a vocational rehabilitation counselor, interviewed claimant by telephone and compiled a list of 26 tasks that claimant had performed in the 15 year period before her accident. No date of the telephone interview was provided in the record, but claimant testified about the task list in her preliminary hearing testimony of July 12, 2010, so it was before that date.

Dr. Terrence Pratt is a certified independent medical examiner and is board certified in physical medicine and rehabilitation. Claimant was referred to him by the ALJ for an IME. He examined claimant on May 15, 2009, evaluating her right shoulder, left shoulder and neck. Claimant gave a history of her accident of March 25, 2005. She told Dr. Pratt that about six months after her April 2007 right shoulder surgery, her second procedure, she started having symptoms in her left shoulder. Claimant also told Dr. Pratt that she noticed cervical involvement sometime after the April 2007 surgery.[6]

After taking a history, reviewing claimant's medical records and performing a physical examination, Dr. Pratt diagnosed claimant with right shoulder syndrome; left shoulder syndrome; and cervicothoracic discomfort without significant evidence of radiculopathy. Dr. Pratt had no recommendations for future treatment of claimant's right shoulder. Using the AMA *Guides*, he rated claimant with a 21 percent permanent partial impairment to the right upper extremity.

Dr. Pratt placed restrictions on claimant in relation to her right shoulder of no lifting in excess of 25 pounds, no overhead lifting over 15 pounds, no frequent overhead activities with the right upper extremity, and no pushing or pulling in excess of 50 pounds. Dr. Pratt opined that claimant had involvement of her right shoulder which related directly to the work-related accident. Dr. Pratt reviewed the task list of Mr. Lindahl, and of the 26 tasks on the list, he opined claimant would be unable to perform 16 for a 61.5 percent task loss.

Dr. Pratt could not relate claimant's cervical or left shoulder symptoms directly to her reported event in 2005. He stated:

> I could not identify a thoracic outlet syndrome and she also has cervical complaints but the MRI of the cervical region was nonrevealing. With cervical complaints and left shoulder complaints, she is a candidate to consider conservative treatment for that involvement but as outlined above, those symptoms were noted far removed from her reported vocationally related event, therefore it is difficult to relate that directly to the reported event in 2005.[7]

In his examination, Dr. Pratt found claimant had subjective complaints of discomfort on palpation of the paraspinous muscles bilaterally and of the parascapular area on the left. Claimant had limited range of motion of the cervical region, primarily in flexion and with lateral movements.

Dr. Pratt was sent additional medical records to review after his examination of claimant, which included a physical therapy report of July 18, 2006, where claimant reported tingling in her neck. Dr. Pratt continued to opine that claimant had no significant

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[6] Claimant did not return to work after the April 2007 surgery.

[7] Pratt Depo., Ex. 2 at 5.

indication of a cervical injury in 2005. Dr. Pratt was also shown an undated memo purportedly sent from claimant to respondent wherein she stated she complained of a sore neck to Dr. Garcia on or about July 19, 2006. Dr. Pratt noted there was no such documentation in Dr. Garcia's records. Dr. Pratt said "if this documentation is true that she reported neck symptoms in 2006 to Doctor Garcia, then it is probable that she had some cervical involvement related to her work activities; but as we've discussed earlier, this statement here is not consistent with what she informed me when she was in the office . . . ."[8] Dr. Pratt said claimant reported that her neck was sore because of the way she was moving to get more extension from her arm to perform above-shoulder activities. Dr. Pratt said that would not cause a specific injury but could result in symptoms over time if done repetitively over a period of a few weeks to a month.

Dr. Pratt stated, after being told some of claimant's job tasks, that those activities could have resulted in involvement of claimant's left shoulder and neck but that no left shoulder or neck involvement was documented in claimant's 2006 medical records. However, if he assumed that claimant's neck conditions were related to her vocational activities and that claimant would have no further treatment and was at MMI, he would find that claimant was in DRE Cervicothoracic Category II of the AMA *Guides*, which would equate to a 5 percent permanent partial impairment to the whole body. Making the same assumptions concerning the left shoulder, Dr. Pratt would rate claimant as having a 5 percent impairment to his left upper extremity at the level of the shoulder. Dr. Pratt stated, however, that neither the left shoulder nor the neck/cervical spine conditions were treated and so would not be truly ratable.

Regarding the left shoulder, Dr. Pratt would add that claimant should avoid frequent overhead activities with the left upper extremities. He would not add any restrictions with regard to claimant's cervical spine or neck.

Dr. Pat Do, a board certified orthopedic surgeon, began treating claimant on August 10, 2010. Claimant's chief complaint was left shoulder pain and some neck pain. Claimant gave a history of an accident on March 23, 2005,[9] with a period of time after that she was overcompensating due to surgeries on her right shoulder and started having left shoulder and neck pain. On examination, Dr. Do found claimant was tender to touch at the musculature of the left shoulder. Claimant had full motion of both shoulders. She had some weakness to the rotator cuff on the left and had signs and symptoms of impingement. Claimant had no specific findings related to her cervical spine. After taking a history, reviewing her medical records, and completing a physical examination, Dr. Do diagnosed claimant with left shoulder pain, impingement, mild rotator cuff pathology, mild

[8] Pratt Depo. at 31.

[9] The date of accident was actually March 25, 2005.

cervical pain, and a possible component of myofascial discomfort or pain. He recommended claimant have an MRI of the shoulder and the neck.

Claimant returned to see Dr. Do on August 17, 2010, after having had the recommended MRIs as well as some x-rays of the neck and left shoulder. There was no change in claimant's physical complaints, and Dr. Do's examination showed no significant changes from August 10. The x-rays and MRI of the neck showed nothing abnormal. The x-ray of the left shoulder showed claimant had a small bone spur. The MRI of claimant's left shoulder showed claimant had inflammation or tendinitis of the rotator cuff. Dr. Do's assessment of claimant as of August 17, 2010, was left shoulder pain, possible rotator cuff pathology, impingement, mild cervical pain and myofascial pain. He recommended claimant have physical therapy and medication.

Dr. Do continued to see claimant and by October 19, 2010, she had the same complaints but clarified that the pain in her shoulder would wake her up at night. Dr. Do said he and claimant discussed her options, and claimant believed her pain was bad enough to warrant left shoulder arthroscopic surgery. Dr. Do performed left shoulder arthroscopic surgery on claimant on November 1, 2010, to clean the joint and remove the bone spur. Claimant came in for a follow-up on November 15, 2010. She was doing well but having some pain in the left shoulder. Dr. Do said there is no indication in the November 15 record that claimant was having symptoms in her neck or cervical spine, but her primary focus would have been on the left shoulder.

Dr. Do saw claimant next on December 14, 2010. At that time, claimant was still having pain in her left shoulder but made no complaints involving her cervical spine. Claimant returned on January 17, 2011. She complained that her left shoulder was tight. Claimant had no complaints involving her neck or cervical spine.

Claimant returned to see Dr. Do on March 1, 2011, complaining of left shoulder pain. She had no complaints of cervical spine or neck problems. After examining claimant, Dr. Do diagnosed her with status post left shoulder arthroscopic subacromial decompression with extensive debridement and adhesive capsulitis. Dr. Do injected claimant's left shoulder with a steroid. Claimant returned on March 21, 2011. She told Dr. Do she was a little improved but still had pain and tightness in her left shoulder. She had no complaints with regard to the symptoms in her neck or cervical spine. Dr. Do examined claimant's spine and found it to be nontender. Claimant continued to have palpable spasms in the parascapular muscle.

Claimant returned again on April 19, 2011. Claimant told him she thought her shoulder was getting tighter. Dr. Do concluded that claimant's adhesive capsulitis was continuing and could be worsening. Claimant had no complaints involving her neck or cervical spine. Dr. Do recommended claimant have a manipulation of her left shoulder under anesthesia in order to help stretch out the shoulder. The manipulation was

conducted on May 2, 2011. Following that appointment, Dr. Do had no other opportunities to evaluate or examine claimant.

Dr. Do believed that claimant's neck problem started in July 2006 and she was still having spasms in August 2010, four years later. Dr. Do prescribed physical therapy to claimant's neck and left shoulder. According to the physical therapy records of October 14, 2010, claimant's pain level with regard to the cervical spine had not gone down.

Following surgery on November 1, 2010, claimant complained of no symptoms involving the neck or cervical spine. Dr. Do said it was likely that the surgery resolved some of the symptom complaints involving claimant's neck and cervical spine. Dr. Do did not diagnose claimant with any myofascial symptoms in the neck or cervical spine after the November 10, 2010, surgery. As of the last time he evaluated claimant, Dr. Do did not believe she had sufficient myofascial pain to justify an impairment rating. He opined she had no ratable condition under the AMA *Guides* related to the cervical spine.

Dr. Do believed claimant had a ratable condition with regard to her left shoulder. Claimant did not have a good outcome from her initial treatment. Her range of motion measurements were poor, and Dr. Do opined she could have had a 15 to 20 percent upper extremity impairment. He did not review the AMA *Guides* in making that guess. He believed someone with a good result from the surgery would have somewhere around a 5 percent impairment of the upper extremity. No one knows for sure what claimant's impairment would have been because Dr. Do did not get the opportunity to follow her through to MMI. Dr. Do also would have to speculate as to what permanent restrictions would have been appropriate for claimant.

Dr. Do was not asked to evaluate or treat claimant's right shoulder. He had no information on which to provide an impairment rating related to claimant's right shoulder.

Cori Smith testified she was claimant's daughter. She testified that in the months before her mother's death, her mother would complain that she could not reach anything above shoulder level or raise her arms much higher than shoulder level. Ms. Smith said her mother also complained that her neck would hurt and she had trouble sleeping because her shoulders hurt.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[10] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[11]

K.S.A. 44-510d(a) states:

> (a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:
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> . . . .
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> (13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.
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> . . . .
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> (23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was

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[10] K.S.A. 2010 Supp. 44-501(a).

[11] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 278, 899 P.2d 1058 (1995).

> earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson,*[12] the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman,*[13] the court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig,*[14] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an

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[12] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[13] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[14] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber,*[15] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[16]

In *Logsdon*,[17] the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
>
> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.
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> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

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[15] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[16] *Id.* at 728.

[17] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006); see also *Leitzke v. Tru-Circle Aerospace*, No. 98,463, unpublished Court of Appeals opinion filed June 6, 2008.

The Kansas Supreme Court, in *Casco,*[18] stated:

> K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c. [Citation omitted.]
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> If the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in any type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability. [Citations omitted.]

ANALYSIS

Having reviewed the entire record, the Board agrees with and adopts the findings and conclusions of the ALJ. Dr. Do was the last physician to examine and treat claimant. And although Dr. Do found claimant was still having neck spasms in August 2010, her level of pain was responding to treatment. Furthermore, Dr. Do performed additional surgery on the left shoulder and subsequently did manipulation of the left shoulder under anesthesia, which he anticipated would result in additional improvement of claimant's cervical complaints. He did not consider claimant to have a ratable permanent impairment of function to the cervical spine.

Claimant argues that it does not matter if her cervical symptoms resolved because Drs. Brown and Dr. Pratt both used the DRE method to rate claimant's cervical impairment. The DRE method is based on diagnosis, and the impairment is established at the time of diagnosis. Therefore, the claimant's condition after treatment is irrelevant to the permanent impairment rating. However, the claimant's diagnosis by Dr. Brown and Dr. Pratt was myofascial pain syndrome. Both of those doctors rated the myofascial pain syndrome but said this diagnosis was not contained within the AMA *Guides*, so they used the DRE for rating injuries to the cervical spine instead. Since the DRE was not for myofascial pain syndrome, it does not necessarily follow that the physician should just look at the date of diagnosis. Furthermore, neither Dr. Brown nor Dr. Pratt said that whether the symptoms were reduced or resolved with treatment was irrelevant to the issue of permanent impairment of function using the DRE. Dr. Brown acknowledged that claimant's improvement would be relevant to the shoulder ratings based on range of motion. Dr. Do considered claimant's condition and possibility of improvement to be relevant to the issue of permanent impairment to the neck.

The Board concludes that claimant was not at maximum medical improvement with respect to her possible cervical and/or neck condition when she was rated by Drs. Brown and Pratt. The record fails to prove a permanent impairment of function to the cervical

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[18] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 528, 154 P.3d 494 (2007).

spine or a general body disability. Claimant's permanent partial disability is limited to her bilateral upper extremities.

Finally, although not addressed by either party, claimant's bilateral injuries give rise to a presumption of permanent total disability. Claimant did not argue that she was permanently totally disabled, but the record shows she did not engage in any substantial and gainful employment after she left work on April 25, 2007, to have her second surgery. Claimant had been able to return to work following her first surgery on her right shoulder, but it was after this return to work that claimant said she developed symptoms in her left shoulder and neck. Although she did not return to work for respondent after the second surgery, claimant testified that she looked for other work. This shows that claimant believed she was capable of engaging in substantial, gainful employment. No physician or vocational expert gave a contrary opinion. Although claimant had a substantial loss of her ability to perform prior work tasks, there were numerous tasks that claimant retained the ability to perform. From those tasks and based upon the restrictions given by the physicians, it is probable that she retained the ability to perform jobs. The presumption of permanent total disability is overcome.

CONCLUSION

Claimant has not proven she suffered a permanent impairment of function to her neck or cervical spine. Claimant does not have a general body disability. Claimant's entitlement to an award of permanent partial disability is limited to two scheduled injuries to her bilateral upper extremities at the shoulder level.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated April 16, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September, 2012.

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BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Pamela J. Fuller, Administrative Law Judge